No. 207.

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IN THE

Supreme Court of the United States.

Filed Dec. 4, 1899.

OCTOBER TERM, 1899.

THE UNION REFRIGERATOR TRANSIT COMPANY,
Plaintiff in Error,

vs.

STEPHEN H. LYNCH, TREASURER OF SALT LAKE COUNTY,
Defendant in Error.

No. 207.

IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

STATEMENT AND BRIEF OF PLAINTIFF IN ERROR.

PERCY WERNER,
Attorney for Plaintiff in Error.
PARLEY L. WILLIAMS,
Of Counsel.

CENTRAL LAW JOURNAL CO., ST. LOUIS.

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THE UNION REFRIGERATOR TRANSIT COMPANY,
Plaintiff in Error,

vs.

STEPHEN H. LYNCH, Treasurer of Salt Lake County,
Defendant in Error.

No. 207.

In Error to the Supreme Court of the State of Utah.

STATEMENT AND BRIEF OF PLAINTIFF IN ERROR.

The State Board of Equalization of the State of Utah, in August, 1897, assessed and valued, of the property of the plaintiff in error, ten cars of the aggregate assessment of $2,600, and apportioned this assessment to the several counties in the State traversed by lines of railway over which cars of plaintiff in error might have passed. To the County of Salt Lake $210 of this assessment was apportioned, upon which taxes for State, school, county and city taxes were levied to the amount of $5.76. Plaintiff in error, to avoid seizure and sale of its property,

paid the tax under protest, and instituted this suit in the District Court of the County of Salt Lake against the county treasurer and collector of taxes to recover back the amount so paid.

The case was heard on demurrer to plaintiff's petition, based on the ground that the complaint did not state facts sufficient to constitute a cause of action. The District Court sustained the demurrer, and plaintiff elected to stand by its complaint, and from a judgment in favor of defendant entered on the 21st day of May, 1898, appealed to the Supreme Court of the State of Utah, to the September Term, 1898, thereof, which court, in an opinion filed December 10th, 1898, affirmed the judgment of the lower court, and the case is here on a writ of error from that judgment.

Inasmuch as the sole question submitted and decided by the courts of Utah was as to whether the complaint filed stated facts sufficient to constitute a cause of action, and that is the only question brought here for review, we will set out the complaint in full.

District Court, Third Judicial District, State of Utah, County of Salt Lake.

The Union Refrigerator Transit Company, a corporation,
Plaintiff,
v.
Stephen H. Lynch, Treasurer of Salt Lake County and Collector of Taxes therein,
Defendant.

The plaintiff complains of the above named defendant and alleges:

That it is and was during all the times hereinafter mentioned a corporation duly organized and existing under and by virtue of the laws of the State of Kentucky.

That its principal office and place of business is in the city of Louisville, in said State, and was and is engaged exclusively in the business of furnishing to shippers refrigerator cars for the transportation of perishable freight over the various lines of railroads throughout the United States, and of soliciting shipments for such cars and giving to the said cars needful attention at various points in transit; that the said cars are and were during the said time the sole property of the plaintiff, and are not and were not during any of the said time allotted, leased, rented, or furnished under contract to any railroad company or companies or carriers of freight; nor were they run on any particular line or lines of railroad; nor were they confined to any particular route or routes, nor in any particular trains, nor at any specified or agreed times, but are and were run indiscriminately over the lines of railroad over which consignors of freight shipped in such cars chose to route them in shipping.

The plaintiff further alleges that the business in which said cars, including the cars hereinbefore mentioned, are and were during the said times engaged in, was exclusively interstate commerce business, being confined to interchange and transportation of perishable products of the various parts of the United States from points in some of said States to points in others of the said States; that plaintiff has not now and has not had any office or place of business within the State of Utah, and that all

freight transported in plaintiff's cars in or through the State of Utah, including the cars hereinafter mentioned, was transported in said cars either from a point or points in a State of the United States outside of the State of Utah to a point or points within the State of Utah, or from a point or points within the State of Utah to a point or points without the State of Utah, or between points neither of which were within the said State of Utah, and that said cars were within said State of Utah at no regular intervals nor in any regular number, and when in said State of Utah were only within it in transit, except to load or unload freight shipped from within out of said State or coming into said State from without the same, or in the transportation of freight entirely through or across said State, and at such times the said cars were only transiently present for the said purposes and not otherwise.

And plaintiff further alleges that said cars do not and did not abide, nor have they at any time had any *situs* within the said State of Utah, nor has this plaintiff, nor has it heretofore at any time had other property of any description whatsoever located within the State of Utah.

And plaintiff alleges that its cars so used as hereinbefore stated, and not otherwise, are not subject to tax within the said State for any purpose whatsoever.

That, notwithstanding the aforesaid facts, the State Board of Equalization of the State of Utah unlawfully and wrongfully, on the 14th day of August, 1897, assessed and valued, of the property of the plaintiff, ten cars, of the aggregate assessment of $2,600, for all purposes of county and State tax-

ation, for the year 1897, and thereafter wrongfully and unlawfully apprortioned the said assessment to the several counties in the said State of Utah, through which lines of railway pass and over which the said cars *might* pass or be transported; that among the counties to which said apportionment was made was the County of Salt Lake, and there was by the said board apportioned to said County of Salt Lake of the said assessment the sum of $210.

That the taxes levied upon the said property so assessed and apportioned to Salt Lake County for State, State school, county, city and city school taxes amounted to the sum of $5.76; that the said tax was and is by reason of the aforesaid facts illegal and void.

That the plaintiff, to avoid the seizure and sale of its property, and to prevent incurring the penalties provided by law, did on the 18th day of November, 1897, pay the said taxes under protest to the said defendant, who was then and still is the duly elected, qualified and acting treasurer of said Salt Lake County, and, by virtue of the said office, the duly authorized and legally constituted collector of all of the said taxes.

That at the time of the payment of the said sum of money so demanded for said tax the plaintiff duly notified the said defendant, as such collector, of the grounds of its claim that the said tax was illegal; that the same was for that reason paid under protest, and that suit would be brought against him to recover the same; that the said protest was made in writing and before the payment of the said sum of money. A copy of the said protest so made and delivered to said defendant at said time is hereto at-

tached, marked Exhibit "A," and made a part of this complaint.

Wherefore the said plaintiff prays judgment against the said defendant, as such treasurer and collector, for the said sum of $5.76 and interest thereon, as provided by law, and also for its costs herein.

P. L. WILLIAMS,
Attorney for Plaintiff.

EXHIBIT "A."

Salt Lake City, Utah, Nov. 18, 1897.

Stephen H. Lynch, County Treasurer, Salt Lake County, and Collector of Taxes.

Sir: You are hereby notified that the State Board of Equalization of the State of Utah assessed for taxation in said State for the year 1897 ten cars of the Union Refrigerator Transit Company, a corporation of the State of Kentucky; that the said ten cars were assessed at $260 each, making a total assessment in the aggregate of the cars of said company within the State of Utah of $2,600, and that the said board apportioned the said assessment of $2,600 on said cars among the several counties in said State through which the lines of railway pass, over which it is claimed said cars of said refrigerator company were used during said year; that in and by such apportionment the said Board of Equalization of said State apportioned to Salt Lake County of said total assessment on said cars of said company the sum of $210, and that the tax levied on said assessment for said State, State school, county, city and city school taxes in said Salt Lake City and County aggregate the sum of $5.76.

You are further notified that the said Board of Equalization of said State made the said assessment and apportionment against said property without authority of law, and that the same is illegal and void on the ground that said company, the owner of said cars, is a non-resident of the State of Utah, has no office or place of business within the State; that its business is owning and letting refrigerator cars to shippers for the transportation of perishable merchandise in interstate commerce only; that its cars never come into the State of Utah except at irregular intervals and carrying such interstate commerce and freight, and for no other purpose than for the transportation of such freight, and the cars are only in the State in transit and have no actual or other *situs* within the said State, and are not subject to taxation by law within said State.

That the whole of the said taxes so assessed and levied upon the property of the said company within said city and county are, by reason of the facts aforesaid, illegal and void, and the said company now protests against the payment of the said sum on the ground that the same is illegal and void, and it submits to pay the same only to prevent the seizure and sale of its property and to avoid being subjected to the penalties provided by law; and you are hereby notified that said railroad company will bring suit against you to recover the said sum of $5.76, so illegally levied as a tax upon its said property and paid, together with interest thereon and the costs of suit.

UNION REFRIGERATOR COMPANY,
By P. L. WILLIAMS,
Its Attorney and Agent.

Specification of Error.

1. The Supreme Court of the State of Utah erred in holding that the cars of the plaintiff in error mentioned and described in the complaint had a *situs* within the State of Utah for the purposes of taxation.

2. The said court erred in holding and deciding that the tax mentioned and set forth in the complaint and therein shown to have been imposed upon the said cars of plaintiff in error, was not a regulation of interstate commerce, and in holding that the tax upon said cars was valid and not in violation of the provision of the Constitution of the United States vesting in the Congress of the United States the exclusive power to regulate commerce among the several States, to-wit: Subdivision 3 of Sec. 8 of Art. I. of said constitution.

3. The said court erred in holding and deciding that the provisions of the statute of the State of Utah under which said tax was attempted to be imposed upon the said cars of plaintiff in error, as set forth in said complaint, authorized the imposition of the said tax.

POINTS.

I.

The cars of plaintiff in error, under the admitted facts set forth in the complaint, acquired no *situs* in the State of Utah, for the purposes of taxation.

Crandall v. Nevada, 6 Wall. 35.

Pullman Palace Car Co. v. Pennsylvania, 141 U. S. 18.

American Ref. Transit Co. v. Hall, 174 U. S. 70.
State *ex rel.* Armour Packing Co. v. Stephens, 146 Mo. 662.
Cent. R. R. v. State Board, 49 N. J. L. 11.
Bain v. Railroad, 105 N. C. 363.
Robinson v. Longley, 18 Nev. 71.

II.

A tax upon vehicles which are employed exclusively in connection with interstate commerce, imposed by the authorities of a State where such vehicles have no *situs*, is invalid and void as violative of the interstate commerce clause of the Federal Constitution.

Fargo v. Michigan, 121 U. S. 230.
Phila. Steamship Co. v. Pennsylvania, 122 U. S. 326, 346.
Brown v. Maryland, 12 Wheat. 449.
State v. Engle, 34 N. J. L. 425.
State *ex rel.* Armour Packing Co. v. Stephens, 146 Mo. 662.

ARGUMENT.

This case follows close along the lines of Pullman Palace Car Co. v. Pennsylvania (141 U. S. 18), and American Refrigerator Transit Company v. Hall (174 U. S. 70), but is clearly distinguishable from both in this, that in both of these cases it appeared that the cars of owners complaining of taxes imposed were *habitually used* in the States wherein the taxes which were resisted were imposed. In the Pullman case the cars were furnished to railroad companies

under contracts entered into between the car owner and the railroad companies, and "were continuously and permanently employed in going to and fro upon certain routes of travel." In the Refrigerator Transit Co.'s case it was admitted that that company had an *average number* of cars, to-wit: forty, which were used within the State of Colorado during the year for which the taxes in question were imposed; and this court in the concluding paragraph of its opinion in the latter case reaffirms its decision in the Pullman case, saying: "The tax may be fixed by an appraisement and valuation of the average amount of the property *thus habitually* used and employed. Nor would the fact that such cars were employed as vehicles of transportation in the interchange of interstate commerce render their taxation (*in*)valid." (174 U. S. 70, 82.)

The following are the facts, admitted by the demurrer to the complaint in this case, with reference to the ownership, location and use of the cars which were assessed and taxed, for the recovery back of the taxes paid on which this proceeding was instituted, viz:

"That plaintiff in error is a corporation duly organized and existing under and by virtue of the laws of the State of Kentucky; that its principal office and place of business is in the city of Louisville, in said State; that it was engaged exclusively in the business of *furnishing to shippers* refrigerator cars for the transportation of perishable freight over the various lines of railroads throughout the United States; that the said cars are and were, during the taxing period in question, the sole property of the plaintiff, and were not, during any of

the said time, allotted, leased, rented, or furnished under contract to any railroad company or companies, or carriers of freight; nor were they run on any particular line or lines of railroad; nor were they confined to any particular route or routes, nor in any particular train, nor at any specified or agreed time, but were run *indiscriminately* over the lines of railroad over which *consignors* of freight shipped in such cars *chose to route them* in shipping; that the business in which said cars were engaged was *exclusively interstate commerce business*, being confined to interchange and transportation of perishable products of the various parts of the United States, from points in some of said States to points in others of the said States; that plaintiff had not any office or place of business within the State of Utah, and that said cars were within said State of Utah at no regular intervals, nor in any regular number, and when in said State of Utah were only within it in transit; and that said cars did not abide, nor have they at any time had any *situs* within the said State of Utah."

The situation of these cars were, therefore, precisely that of the cars involved in the case of Fargo v. Michigan (121 U. S. 230), as to which the statement of facts in that case discloses:

"Third. That during the said year the said transportation company was possessed of certain freight cars, which were used and run by the railroad companies in whose possession they chanced from time to time to be for the transportation, upon their own and connecting lines of railroad, of through freight, principally between the city of New York, in the State of New York, and Boston, in the State of

Massachusetts, and Chicago, in the State of Illinois, and other points and commercial centers in the west, northwest and southwest, without the State of Michigan; that said cars were not used for the carriage of freight between points situate within the said State of Michigan, but wholly for the transportation of freight, either passing through the State, or originating at points without said State and destined to points within, or originating at points within said State and destined to points without."

In the Fargo case the tax was on the gross receipts derived from the use of the cars involved, instead of on the cars themselves, as here; but this is a distinction without a difference, so far as the questions here presented are concerned. As said by Justic Miller: "To hold that a tax on freight is within it (*i. e., the commerce* clause of the constitution), and that on gross receipts arising from such transportation is not, is 'to keep the word of promise to the ear and break it to the hope.'" (15 Wall 292.) Where property is used exclusively as an instrumentality of interstate commerce, the tax, of course, becomes a burden on that commerce, whether directed against the property or the use. (See Brown v. Maryland, 12 Wheat. 449; Passenger Cases, 7 How. 458.)

The opinion of the Supreme Court of Utah upholding the tax in question here is, we say, and with all respect, more specious than sound. It may be reduced to the following propositions:

1st. A nation within whose territory any personal property is actually, though but temporarily and transiently, situate, has an entire dominion over

it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situate there.

2d. The cars of plaintiff in error came within the borders of this State, temporarily and transiently.

3d. Therefore, they fell under the dominion of, and within the jurisdiction of, this State, and were subject to taxation.

Thus is the question of *situs* disposed of. The question as to the interference with interstate commerce is then easily disposed of by reference to repeated decisions of this court, that the *mere fact that property is employed in interstate commerce does not exempt it from State taxation.*

The last proposition is doubtless true; but is it true that property which is brought into a State temporarily, and is within its borders only transiently, acquires a *situs* in the State for the purpose of taxation? Is it literally true, and is it to be understood to be the law of the land that, as this court has said in the Pullman case, *supra*:

"The State, having the right, for the purpose of taxation, to tax any personal property found within its jurisdiction, without regard to the place of the owner's domicile, could tax the specific cars which, *at a given moment* (!), were within its borders"—irrespective of the character of the use of the cars in the State? It certainly was not necessary to lay down so extreme a proposition in that case—where, admittedly, a hundred cars were *habitually* and *continuously* used along definite routes of travel, under contract with the owner, within the State. Yet, the Supreme Court of Utah follows this as a literal precept of the law. If it be so, we say, with-

out fear, that it is utterly subversive of the doctrines recognized and applied by the courts of this country from the foundation of this Government; and, moreover, that the logical consequences of this doctrine are so appalling that no lover of this country's form of government can do aught but shudder when he contemplates them. It involves a revolution. It means that no citizen of one State may permit any of his property to pass beyond the boundaries of his State without subjecting it to the liability of being pounced on and destroyed by each of the sovereign States through whose territory he may venture to allow it to pass. The union of our several States would exist only in name.

We are convinced that this doctrine is as unsound as it is shocking, and that its adoption by the Supreme Court of Utah arises from a confusion of the powers of an *absolute sovereign*, with those of one of the States of our Union. True, an absolute sovereign may tax or destroy whatever it finds "at a given moment" within its borders. Yet a State of the American Union is not an absolute sovereign. The right to absolute sovereignty was surrendered by the adoption of the Federal Constitution. *Apparently* the Supreme Court of Utah recognizes this, though really it does not. It says: "*The power to tax being inherent in the Government, the State unquestionably has the right through the legislature to exercise that power over all property which may be found within its borders,* WHETHER BROUGHT THERE TEMPORARILY OR OTHERWISE, *for the purpose of business or for trade or convenience,* UNLESS RESTRAINED OR LIMITED BY CONSTITUTIONAL PROVISION, and courts cannot control the exercise of such power,

except when it conflicts with constitutional provisions." (Transcript, p. 10.) *Really* the court recognizes no constitutional restriction.

It is fallacious to contend that each one of our States may tax whatever it protects. This is not true. The property of the citizens of each State is immune from taxation in every other State into which it finds its way in the course of, and while still in the stream of, interstate commerce. This is the consideration for the abdication by each State of its sovereignty over such property, and for its protection whilst within the borders of the State. Each State affords like protection without taxation to the property of the citizens of other States similarly used.

Take the simple case of Longley v. Robinson, *supra*. In this case the Supreme Court of Nevada held that a traveling circus and menagerie, owned by a non-resident, and brought into the State to be exhibited at various places and then taken into and through other States for the same purpose, was not subject to taxation in that State. The court said, in passing upon the question: "The property was not accessible in the State. In the sense of the statute for the purpose of taxation it was not within the State. It was passing through the State at the time of the assessment. It was here temporarily in the ordinary course of business. When he came here plaintiff intended to remain in the State but a few days and then to continue his journey to other places in a neighboring State. He intended to take away all the property he brought with him. He was actually 'on the wing,' passing from one State to another. As well might his property have been

taxed if for the purpose of rest or health plaintiff had stopped a few days in Washoe County. As well might a resident of another State be taxed on his money and team, if he comes on a visit to the State to remain a week."

This decision is in harmony with the unbroken current of authorities. And wherein does this Nevada case differ from the case at bar? In the Nevada case the menagerie was transported on cars and exhibited along the lines of railroads, and today no traveling circus but has its specially constructed railway cars,—scarcely any large theatrical or operatic troupe but has its private baggage cars for scenery and costumes. These have but followed the lead of shippers of oil, of perishable freight, of live stock, of poultry and furniture, who have found it expedient to use a style of car different from that ordinarily furnished by railway companies for freight shipments. Not all shippers are able, as are the Standard Oil Co. and the Armour Packing Co., to own railroad cars, and hence companies like plaintiff in error, who supply the smaller shippers with a style of cars which the railroad companies find it out of their power, or at least, unremunerative, to supply. Has the law changed with this evolution in the carrying trade? Shall the *goods* in the cars and the *freight charges* be exempt from taxation, and the *cars* themselves be liable to seizure and distraint in every county of every State through which they happen to pass on journeys of interstate commerce? And if the cars belonging to shippers and to private car owners supplying shippers be taxable wherever they happen temporarily to stray, shall not those belonging

to owners who also operate railroads be subject to the same rule of law?

These are serious questions, and could scarcely have been asked soberly a few years ago, before the seemingly outermost limits of the power of the State to tax the instrumentalities of interstate commerce were reached by this court in the Pullman and Express Co. tax cases. An anxious profession, who are the aids of this court in the ministration of justice, are watching and waiting to know whether it be true, as has been announced by the Supreme Court of Utah in this case, that a State may, without inquiry, tax whatever it finds transiently and temporarily at any given moment within its borders.

In view of the numerous late decisions of this court which have compelled this court to consider and apply all the earlier decisions of this court bearing upon the questions presented in this case, it would be burdening this court unnecessarily to review in this brief all those cases, and we will content ourselves with a brief notice of the last case, that of American Refrigerator Transit Co. v. Hall (174 U. S. 70). This court says of that case: "In the case before us we do not need to go far in search of the principles which determine it. We think they may be found in the cases of Western Union Tel. Co. v. Massachusetts, 125 U. S. 530; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, and Adam's Express Co. v. Ohio, 165 U. S. 194."

In the telegraph and express tax cases the property taxed was actually and permanently located in the taxing State. The question was not whether the property was taxable, but how it should be valued—as separate and independent, or as part of a

system extending through other States. In the Pullman case it was held that property owned in other States and not technically fixed or located in the taxing State, might become merged in the mass of taxable property in the latter by regular and constant use therein in unvarying quantities, over definite routes of travel, under express contract for such use.

How far beyond these cases this court has gone in the Refrigerator Transit Co. case is not quite clear. Apparently the only distinction between that case and the Pullman case which this court found, was in the fact of the *varying* number of cars used in the State, in the Pullman case the number being fixed and constant; for this court says (174 U. S. p. 82): "The *only* question is whether it was competent to ascertain the number of the cars to be subjected to taxation by inquiring into the *average number* used within the State limits during the period for which the assessment was made." And continuing this court says: "It having been settled, as we have seen, that where a corporation of one State brings into another, to use and employ, a portion of its movable personal property, it is legitimate for the latter to impose upon such property thus used and employed, its fair share of the burdens of taxation imposed upon similar property *used in like way by its own citizens*, we think that such a tax may be properly assessed and collected in cases like the present, whether specific and individual items of property so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business, and that the tax may be fixed by an appraisement and valu-

ation of the *average amount of the property thus habitually used and employed.*"

The Supreme Court of Utah admittedly finds itself opposed to two very respectable courts of last resort in this country, as it says (see opinion p. 12 of Transcript): "*There have been cited, however, on this same point, the cases of Central R. R. Co. v. State Board of Assessors*, 49 *N. J. L.* 1, *and Bain v. Railroad*, 105 *N. C.* 363, *and these it must be admitted support the contention of the appellant, and some of the cases above distinguished as therein cited as authority. We do not think those decisions are in harmony with the weight of authority, and they are clearly opposed to the latest decisions of the Supreme Court of the United States upon this subject, as appears from the cases of The Pullman Car Co. v. Pennsylvania*, 141 *U. S.* 18; *Adams Express Co. v. Ohio*, 165 *U. S.* 194, *and Adams Express Co. v. Ohio*, 136 *U. S.* 185."

We invite this court's especial attention to the New Jersey and North Carolina cases here pronounced to be in conflict with the late cases of this court. The cases are unusually well considered cases, and the decisions are based entirely upon the decisions of this court.

In the case at bar it appears that certain of the cars of the plaintiff in error passed, at irregular intervals, and strictly as instrumentalities of interstate commerce, through the State of Utah; that the cars were furnished to shippers of perishable freight, and not leased, rented, or furnished under any contract to any railroad company; it is admitted that plaintiff in error never had any office or property within the State of Utah, and that its

cars were never in the State, except transiently, and obtained no *situs* there. It further appears that the State Board of Equalization arbitrarily assessed to plaintiff in error ten cars, and fixed the value of the cars at $260 each, and apportioned the assessment for taxation between the several counties in the State through which the cars MIGHT pass over railroads traversing them.

We have here, then, an extreme case—no definite number of cars confined to a single run, under contract with the railroad company, as in the Pullman case, and no *average number throughout the year*, as in the Refrigerator Transit Co. case. It does not even appear that the cars of plaintiff in error were *habitually* used in the State of Utah, but that the cars were furnished to shippers of perishable freight, and their getting into the State would entirely depend upon the accident of choice of the shipper in routing the cars. For aught that appears, one or more of those cars might have been within the State once, or oftener, during a year, or it may happen that none of the cars will be within the State within any specified year, and in another year they may, in a particular limited season, pass through the State in considerable numbers—but always transiently, and never abiding within the State, or having a *situs* therein, or becoming commingled with the general mass of the property within its borders.

If, now, the State of Utah is an absolute sovereignty, and has the exclusive right to say what gives personal property a *situs* within the State for the purposes of taxation, and may say that a vehicle of interstate commerce belonging to a non-

resident owner, and passing through the State on a special journey between two distant points in the union, acquires a *situs* by virtue of such transient presence within the State, then Congress has not only not the exclusive right to regulate interstate commerce, but is really powerless in the premises.

It is useless to discuss here the question of the effect of the tax as an interference with interstate commerce. The tax, of course, imposes a burden on the commerce, and if the tax is illegal, its imposition constitutes an interference with such commerce. This will not be denied. The question as to the *situs* of this property, and the question as to the imposition of the tax constituting an interference with interstate commerce, are not two questions, but one question. Grant the *situs*, the right to tax exists, independent of the use of the property. It thus follows that this question of the *situs* of property, taxed because within the borders of a State, involves the questions of the taking of property without due process of law, and the imposition of burdens upon interstate commerce, and is thus peculiarly a federal question.

It is settled that interstate commerce may not be taxed in the several States as such, either its privileges, rights, or proceeds. It is likewise settled that property is not exempt from taxation in the several States *merely* because of its relation to interstate commerce. We contend that transient property, which enters a State only to pass through it, either as the subject or the instrument of interstate commerce, can never, under the Federal Constitution, be reached by the taxing power of the State. And we contend that if a single car makes a single,

continuous and transient trip across the territory of a State, and thereby acquires no *situs* in the State, the fact that two or more cars may make such trips, or that one car may make two or more such trips, does not give such car or cars a *situs* within the State.

All of which is respectfully submitted.

PERCY WERNER,
Attorney for Plaintiff in Error.

PARLEY L. WILLIAMS,
Of Counsel.